

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE
(PPA) PRODUCTS LIABILITY
LITIGATION,

MDL NO. 1407

ORDER GRANTING BAYER
CORPORATION'S RENEWED
MOTION FOR SUMMARY
JUDGMENT

This document relates to:

David Lindsey v. Bayer Corp.,
No. 03-cv-874

This matter comes before the court on Defendant Bayer Corporation's ("Bayer") Renewed Motion for Summary Judgment. Bayer moves for summary judgment dismissal of the claims of Plaintiff David Lindsey, individually and as administrator of the estate of Linda Lindsey (collectively, "Plaintiff"). Plaintiff, who has been litigating this matter *pro se* since June 16, 2005, did not file an opposition to this motion. The court, having reviewed Bayer's motion, finds and rules as follows:

Plaintiff alleges that his late wife's ingestion of Alka Seltzer Plus Cold Effervescent Medicine ("ASP"), a PPA-containing medicine manufactured and distributed by Bayer, caused her to experience a hemorrhagic stroke that eventually led to her death in September 1998. Bayer deposed Plaintiff on December 8, 2004.

1 During this deposition, Plaintiff produced an opened, empty, two-
2 tablet packet of ASP bearing the lot number 120490E. Plaintiff
3 testified under oath that several weeks after his wife's death,
4 he emptied out her purse and found this packet. He indicated that
5 he found no other ASP packets in his wife's belongings, or in his
6 home. Plaintiff testified that to the best of his knowledge, on
7 September 28, 1998, his wife ingested ASP from the packet bearing
8 lot number 120490E, and that the packet bearing lot number
9 120490E was the only ASP packet from which his wife could have
10 consumed ASP on the relevant date.

11 Bayer's manufacturing records have established that the ASP
12 bearing this lot number was not manufactured until May 23, 2000,
13 and was not released for shipping until May 26, 2000, nearly two
14 years after plaintiff's wife's stroke. On August 22, 2005, Bayer
15 moved for summary judgment on this basis.

16 In opposition to Bayer's original motion, Plaintiff produced
17 a photocopy of a new ASP packet with an expiration date prior to
18 his wife's death, offering no explanation as to how, where or
19 when he came into possession of this additional packet. The
20 court, mindful of the fact that plaintiff was proceeding *pro se*,
21 allowed him to supplement his response with an affidavit
22 explaining how he came into possession of this new ASP packet,
23 and why the court should disregard his previous, inconsistent
24 deposition testimony. Plaintiff filed a supplemental opposition
25 in which he asserted in an affidavit that he located the second
26 packet of ASP after an additional search of his wife's

1 belongings. The court found that Plaintiff's sworn testimony
2 established a genuine dispute of material fact, and was
3 sufficient to explain the prior inconsistent testimony, rendering
4 summary judgment inappropriate.

5 At Bayer's request, this court permitted Bayer to redepose
6 Plaintiff and to depose Plaintiff's daughter, as well as two of
7 Plaintiff's former attorneys. Bayer redeposed Plaintiff on May 2-
8 3, 2006. At this deposition, Plaintiff produced a two-tablet
9 packet of ASP, expiration date 10/97, which had one tablet
10 missing. Plaintiff's testimony was not always clear, but he did
11 not recant his former testimony that his wife ingested ASP from
12 the packet bearing lot number 120490E. He claimed, however, to be
13 unable to recall whether the packet he retrieved from his wife's
14 purse was the one bearing lot number 120490E. When Bayer
15 confronted Plaintiff with his signed Plaintiff's Fact Sheets
16 confirming that the relevant packet was the one bearing lot
17 number 120490E, Plaintiff refused to read the relevant portions.
18 Plaintiff testified that within a month of his December 2004
19 deposition, his daughter found the ASP packet that had an
20 expiration date of 10/97 in his wife's purse. Plaintiff explained
21 that he believed he had "overlooked" it. Plaintiff at last
22 indicated that he would defer to the recollection of his former
23 lawyers.

24 Bayer deposed Plaintiff's daughter, Cadedra Carter, on May
25 3, 2006. Her testimony conflicted with that of her father. Ms.
26 Carter testified that within a year of her mother's September

1 1998 death, she found the ASP packet with an expiration date of
2 10/97.

3 Bayer deposed Plaintiff's former attorneys, Richard Kopelman
4 and Michael Rosenberg. Mr. Kopelman and Mr. Rosenberg testified
5 that Plaintiff had given them two packets of ASP. One bore lot
6 number 120490E, and the other bore lot number 152601T, with an
7 expiration date of 7/03.¹ Mr. Rosenberg testified that on more
8 than one occasion, including in preparation for Plaintiff's
9 December 2004 deposition, he discussed these two packets with
10 Plaintiff. Mr. Rosenberg recalled that Plaintiff was certain that
11 the packet bearing lot number 120490E was the one he found in his
12 wife's purse, and that it was the sole source of the medicine she
13 ingested prior to her stroke. Mr. Rosenberg testified that he had
14 explained to Plaintiff: (1) that the decedent could not have
15 taken medicine from the package bearing lot number 120490E,
16 because had not been manufactured until after her death; and (2)
17 the ASP in the packet marked with lot number 152601T was also
18 manufactured after Plaintiff's wife's death, and that it
19 contained a reformulated version of ASP that did not contain PPA.
20 Mr. Rosenberg stated that despite this explanation, Plaintiff
21 maintained that the ASP packet bearing lot number 120490E was the
22 correct package, and testified as such at his December 2004
23 deposition. Finally, Mr. Rosenberg testified that Plaintiff never
24 advised him of the existence of any other packets of ASP from

25 ¹According to Bayer, this was the first information it received about a
26 third packet of ASP.

1 which the decedent could have consumed medication.

2 Following these depositions, Bayer filed this Renewed Motion
3 for Summary Judgment, arguing that Plaintiff failed to offer any
4 credible explanation why his new and contradictory allegations
5 should be favored over his prior sworn testimony. Along with its
6 motion, Bayer filed a certificate of service stating that it
7 served Plaintiff by U.S. mail at what the court believes to be
8 Plaintiff's current home address. Nevertheless, Plaintiff failed
9 to file any kind of response to Bayer's Renewed Motion for
10 Summary Judgment.

11 Fed. R. Civ. P. 56(e)(2) states:

12 When a motion for summary judgment is properly made and
13 supported, an opposing party may not rely merely on
14 allegations or denials in its own pleading; rather, its
15 response must- by affidavits or as otherwise provided
16 in this rule- set out specific facts showing a genuine
17 issue for trial. *If the opposing party does not so*
18 *respond, summary judgment should, if appropriate, be*
19 *entered against that party.* (Emphasis added.)

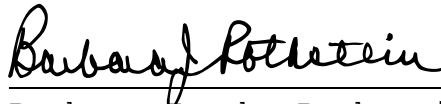
16 Although Plaintiff is litigating this matter *pro se*, he had an
17 obligation to file an opposition to this motion. The 9th Circuit
18 has specifically rejected the argument that non-prisoner *pro se*
19 litigants are entitled to any special notice from the court
20 regarding the requirements of Rule 56. Jacobsen v. Filler, 790
21 F.2d 1362 (9th Cir. 1986). Moreover, in 2005, after the court
22 advised Plaintiff of the form of the response required to defeat
23 a motion for summary judgment, this *pro se* plaintiff successfully
24 opposed Bayer's motion by filing an affidavit. The court will not
25 excuse Plaintiff's failure to file an opposition to this motion.

26 Further, the court agrees with Bayer that Plaintiff has

1 failed to provide any credible explanation for the existence of
2 the newly provided ASP packet, and therefore also has failed to
3 provide a valid reason for this court to disregard his prior
4 sworn testimony. A party cannot create a genuine issue of
5 material fact to survive summary judgment by contradicting in
6 affidavit his earlier version of the facts. Block v. City of Los
7 Angeles, 253 F.3d 410, 419 n.2 (9th Cir. 2001), citing Radobenko
8 v. Automated Equip Corp., 520 F.2d 540, 544 (9th Cir. 1975). In
9 this case, the court ruled that the affidavit Plaintiff submitted
10 in opposition to Bayer's first motion for summary judgment was
11 sufficient to defeat that motion. However, in light of the
12 depositions conducted by Bayer since that time, and in light of
13 Plaintiff's complete failure to respond to the instant motion,
14 the court finds that there is no genuine issue of material fact,
15 and that summary judgment is therefore appropriate.

16 This court hereby GRANTS Bayer's Renewed Motion for Summary
17 Judgment, and ORDERS that this action be DISMISSED with prejudice
18 in its entirety.

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20 DATED at Seattle, Washington this 6th day of February,
21 2008.

22 
23 Barbara Jacobs Rothstein
24 U.S. District Court Judge
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